

Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: March 1, 2013
TO: Councilmember David Alvarez
FROM: City Attorney
SUBJECT: Appointments to the San Diego Unified Port District Board of Commissioners

This memorandum will supplement two recent memoranda issued by this Office regarding the City Council's appointments to the San Diego Unified Port District Board of Commissioners (the Port District Board), and address questions raised by Councilmember David Alvarez. For convenience, the previous memoranda are attached. Questions are restated below with a corresponding response.

1. When multiple appointments are being made at the same hearing should the City Council appoint the candidates in one resolution together or two separate resolutions?

Please see Section I of our memorandum to the Mayor and Council, "Reconsideration of Resolution Vetoed by the Mayor," dated January 30, 2013. Multiple appointments have historically been placed in one resolution for the Council. However, consistent with past oral advice, the Council may direct the City Attorney to use two resolutions for future appointments. This is a matter that is for the Council to decide. The Council can provide direction to the City Attorney regarding its preference for a given item.

At the appointment hearing of January 7, 2013, one resolution was prepared and uploaded with the item on the docket. After the hearing, the names of the appointees were inserted in the blanks. After our Office was asked if two resolutions could be used, and stated that this could occur, it was up to the Council to provide that direction to this Office. The Council did not direct the City Attorney's Office to prepare two resolutions. Rather, at the hearing, Councilmember Faulconer asked for clarification as to whether one resolution would be used; Council President Gloria responded that one resolution was before the Council. (See January 30, 2013 Memorandum at p. 3.) This discussion occurred before the voting began.

2. Can the City Council change the timing and length of Port Commissioner terms to allow for staggered terms, making multiple vacancies coming before the City Council at the same time less likely? Can the City Council establish different terms for various seats, for instance having one seat be for a four-year term, while another seat be for a two-year term?

No. Consistent with our oral advice given on February 11, 2013, the timing and length of Port Commissioner terms is a matter of state law and not within the City's jurisdiction.

Terms on the San Diego Port District are defined by state law. State law requires four-year terms. (See Cal. Harb. & Nav. Code, app. 1. §17.) The Council does not have the jurisdiction or power to change the duration of terms. Section 17 of the Port Act states in relevant part:

Section 17. TERM OF COMMISSIONERS; VACANCIES; OATH; CERTIFICATE; REMOVAL.

The term of each commissioner shall be for four years, except as provided in this section.

Any vacancy shall be filled by appointment by the city council of the city from which the vacancy has occurred. Any appointment to fill a vacancy during the term of a commissioner shall be for the unexpired term.

Cal. Harb. & Nav. Code, app. 1. §17.

All terms begin on January 3 of a given year, and end on January 2. Moreover, terms are already staggered on the seven-member board; two of the City of San Diego's three positions on the Board have the same term dates (two terms will expire January 2, 2017; the third position expires January 2, 2015). For the seven-member board, which includes four members from other cities:

- three terms end in 2017;
- three terms end in 2015;
- one term ends in 2014.

(See City Clerk's website, <http://www.sandiego.gov/city-clerk/boards-commissions/port.shtml>, for chart of current Port District Commissioners and their terms, and resolutions appointing previous members representing the City of San Diego, also available on the City Clerk's website.)

3. Concerning the voting procedure during future City Council meetings, can Council Policy be amended to specify that the least vote getter is eliminated after every round and in the case of a tie, multiple candidates be "dropped?"

Yes, the voting procedure may be changed by the Council. The Council's voting procedures are discussed in the attached memoranda of January 17, 2013 and January 30, 2013.

However, Roberts Rules of Order disfavors this approach. Roberts Rules states the following, in relevant part, in its 10th edition, at pages 426-427:

“ . . . When repeated balloting for an office is necessary, the names of all nominees are kept on the ballot. The nominee receiving the lowest number of votes is never removed from the next ballot unless the bylaws so require, or unless he withdraws – which, in the absence of such a bylaw, he is not obligated to do. The nominee in lowest place may turn out to be a “dark horse” on whom all factions may prefer to agree.” (Roberts Rules of Order, 426-427 (10th ed. 2000).)

4. In an instance where two vacancies occur at once, can candidates be limited to being nominated for a specific designated seat (if a process is in place as outlined in question number 2)?

As set forth above, the process outlined in question number 2 is beyond the Council’s jurisdiction. If, however, the Council wished to ensure that candidates were nominated for specific seats, the Council should give careful thought to the logistics of how this would work. For example, when nominations are taken, would an applicant be asked to apply for one spot or the other? What if all candidates that a Councilmember supports have signed up for the same position? What if there is no support for anyone who signs up for the second position? Does the applicant decide which position to apply for at the outset or later? How does the process provide for fairness and full consideration of all applicants? This suggestion also would affect the noticing of the positions. Assuming the Council desires to move forward with such a process, our Office would need to conduct additional research to determine if this suggestion would be feasible or ensures fair review of all applicants.

5. The fifth question requested a written response to questions from a January 7, 2013 memorandum from Councilmember Alvarez regarding Council Policy 000-13.

The majority of the questions posed in the January 7 memorandum ask this office to interpret specific words and phrases within Council Policy 000-13. The questions are designed to “provide a detailed rationale for the interpretation proposed by your office.” (See Question 1 of Memorandum from Councilmember Alvarez.) Our Office discussed its interpretation of the Council Policy with each Council office before the January 7 hearing, and later at two Council hearings on this issue. We acknowledge that certain Councilmembers disagree with the interpretation.

In response to the questions in the January 7 memorandum, we reiterate that the Council Policy must be read *as a whole*. Each section and phrase must be harmonized with the rest. In this regard, it is analogous to statutory interpretation. Fundamental rules of statutory interpretation require that a statute be read as a whole, and that the parts of a statute be read together and harmonized, when possible, in order to give effect to the intent of the Legislature. *Ingram v. Justice Court for Lake Valley Judicial District of El Dorado*, 69 Cal. 2d 832, 839 (1968); *Marrujo v. Hunt*, 71 Cal. App. 3d 972, 977 (1977). To construe the whole by focusing on single words would be misleading. Rather, we construe a rule to give force and effect to all its parts and sections. Cal. Code Civ. Proc. §1858.

To isolate a specific phrase for analysis takes the policy out of context, and will lead to a misleading interpretation of how the policy may be applied. Moreover, the questions ask about section (C)(4)(d), without considering other sections of the policy, including the section that states that anyone receiving at least five votes shall be appointed – regardless of the number of positions at issue.

Additionally, we note that Question 6 asks whether an interpretation of Council Policy 000-13 was “contemplated when the calls for nominations were made.” This Office did not participate in the nomination process, nor was it aware of when calls for nomination were made. As such, we cannot comment on the thought process of those nominating Councilmembers. Question 7 asked about consistency between past Port Commission nominations and the nominations of January 7, 2013. We note that Council Policy 000-13 was amended by the Council after the last round of Port appointments.

We reiterate that the legislative body is the sole judge of its procedural rules and can vote to waive them at any time. It is not the role of our Office to propose a new policy or a change, but we can assist as may be directed by the Council. Our Office remains available to assist with any amendments the Council may propose to Council Policy 000-13.

JAN I. GOLDSMITH, City Attorney

By 

Sharon B. Spivak
Deputy City Attorney

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Attachments

cc. Mayor Bob Filner

City Councilmembers

Andrea Tevlin, Independent Budget Analyst

Elizabeth Maland, City Clerk

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